ONG AH TANG & ANOR

v.

SOH BEE YONG

COURT OF APPEAL, PUTRAJAYA
LOW HOP BING JCA
ABU SAMAH NORDIN JCA
AZIAH ALI JCA
[CIVIL APPEAL NO: J-02-862-2007]
14 FEBRUARY 2011

LAND LAW: *Sale of land - Public auction - Application by administrators of land - Duty of court - Whether court bound to protect rights of beneficiaries - Whether sale by auction favourable to beneficiaries - Whether majority of beneficiaries supported application for public auction*

SUCCESSION: *Administration - Sale of land - Public auction - Application by administrators of land - Whether sale by auction favourable to beneficiaries - Whether majority of beneficiaries supported application for public auction*

The appellants and the respondent were the joint administrators of the estate of the deceased involving two pieces of land. The appellants alleged that there was a verbal offer to purchase the lands for a sum of RM713,510 and therefore filed an application for the lands to be sold by public auction and the proceeds of the sale to be distributed among the beneficiaries. The respondent, who had been in occupation of the lands, opposed the application and offered to buy the lands at the total price of RM480,000, which was rejected by the appellants. The learned judge dismissed the appellants' application on the ground that there was no concrete proof that there was an offer to purchase the lands at RM713,510. The learned judge went on further to order the appellants to sell the lands to the respondent at a total price of RM480,000 and to execute the memorandum of transfer and the sale proceeds to be divided among the beneficiaries. Being dissatisfied, the appellants appealed and contended that the learned judge had gone beyond the scope of their application for the lands to be sold by public auction.

A **Held (allowing appeal with costs; order of High Court set aside and lands ordered to be sold by way of public auction) Per Abu Samah Nordin JCA delivering the judgment of the court:**

B **(1)** The High Court ordered the lands to be sold to the respondent contrary to the relief sought by the appellants and against the wishes of the majority of the beneficiaries who supported the application that the lands be sold by public auction. There was no averment in the respondent's affidavit C in opposition, that the lands be sold to him at RM480,000. (para 10)

(2) The court clearly went beyond the scope of the appellants' application in ordering the lands to be sold to the respondent after having dismissed the appellants' application. There was D no evidence before the court to determine what the best possible price was at the time of making the order. In the circumstances, the order was legally unsustainable. (para 10)

Bahasa Malaysia *Translation Of Headnotes*

E

Perayu-perayu dan responden merupakan pentadbir bersama harta pusaka si mati yang termasuk dua bidang tanah. Perayu-perayu mendakwa bahawa terdapat tawaran secara lisan untuk membeli tanah-tanah tersebut pada harga RM713,510 dan dengan itu F memfailkan permohonan untuk tanah-tanah tersebut dijual melalui lelongan awam dan hasilnya diagihkan kepada kesemua benefisiari. Responden, yang menetap di atas tanah-tanah tersebut, membantah permohonan dan menawarkan untuk membeli tanah-tanah tersebut pada harga RM480,000, yang ditolak oleh perayu-G perayu. Yang arif hakim menolak permohonan perayu-perayu atas alasan tidak ada bukti yang konkrit bahawa terdapat tawaran untuk membeli tanah-tanah tersebut pada harga RM713,510. Yang arif hakim juga selanjutnya memerintahkan perayu-perayu menjual tanah-tanah tersebut kepada responden pada jumlah harga H RM480,000 dan menandatangani memorandum pindah milik dan hasil jualan tersebut diagihkan kepada benefisiari-benefisiari. Tidak berpuas hati, perayu-perayu merayu dan hujahan mereka adalah bahawa yang arif hakim telah melampaui skop permohonan mereka bagi tanah-tanah tersebut dijual melalui lelongan awam.

I

Diputuskan (membenarkan rayuan dengan kos; perintah Mahkamah Tinggi diketepikan dan tanah-tanah diperintahkan dijual melalui lelongan awam)
Oleh Abu Samah Nordin HMR menyampaikan penghakiman mahkamah:

(1) Mahkamah Tinggi memerintahkan tanah-tanah tersebut dijual kepada responden yang bertentangan dengan relief yang dipohon oleh perayu-perayu dan bertentangan dengan kemahuan majoriti benefisiari yang menyokong permohonan bahawa tanah-tanah tersebut dijual melalui lelongan awam. Tidak ada pengataan di dalam afidavit menentang oleh responden, bahawa tanah-tanah tersebut dijual kepadanya pada harga RM480,000.

(2) Mahkamah jelas telah melampaui skop permohonan perayu-perayu dalam memerintahkan tanah-tanah tersebut dijual kepada responden selepas menolak permohonan perayu-perayu. Tidak ada keterangan di hadapan mahkamah untuk menentukan apakah harga yang terbaik pada masa perintah diberikan. Dalam hal keadaan tersebut, perintah tersebut tidak boleh dikekalkan dari segi undang-undang.

Case(s) referred to:
Ong Thye Peng v. Loo Choo Teng & Ors [2008] 1 CLJ 571 FC ***(refd)***
Yap Yoke Luan & Others v. Ong Wee Tok & Ors [1983] 2 CLJ 252; [1983] CLJ (Rep) 433 ***(refd)***

Legislation referred to:
Probate and Administration Act 1959, s. 60(2), (4)(a)

For the appellants - Kee Tong Kiat; M/s Chee Siah Lee Kee & Partners
For the respondent - Lum Chee Seng; M/s Lum Chee Seng & Assocs

[Appeal from High Court, Muar; Originating Summons No: 24(L)-535-2005]

Reported by S Barathi

JUDGMENT

Abu Samah Nordin JCA:

[1] This is a dispute between the administrators over the administration of the estate of Soo Wan Yau @ Soh Get Swee ('deceased') involving two pieces of land held under CT No. 1655, Lot 3454 and Grant No. 14271, Lot 2211, in the township of Bandar Maharani, Muar, Johor ('the lands').

[2] The appellants (plaintiffs in the court below) and the respondent are joint administrators of the deceased estate. The letters of administration was granted to them by the High Court, Muar on 16 April 1979.

[3] They are also parties who have interests in the said lands. The first appellant is the deceased's lawful wife while the second appellant and the respondent are the deceased's children. The document of titles are with the respondent who had been in occupation of the said lands for years.

[4] The appellants preferred to sell the lands by way of a public auction and distribute the proceeds of sale of the lands among the beneficiaries in accordance with the Distribution Act 1958, after deducting the costs and related expenses. There was a verbal offer to the appellants to purchase the said lands for a sum of RM713,510. On 7 October 2004 the appellants, through their solicitors wrote to the respondent giving him the first option to purchase the lands at RM713,510, failing which they would apply to the High Court to sell the lands by public auction. Based on valuation reports in May 2005, the market value of Lot 2211 and Lot 3453 in May 2005 was RM224,000 and RM252,000 respectively. There was no response from the respondent to the letter from the appellants' solicitors.

[5] As the matter could not be resolved and had derailed the administration of the deceased's estate, the appellants filed an application by way of an Originating Summons at the Muar High Court for an order, *inter alia*, that the lands be sold by public auction and that the proceeds of the sale of the lands be distributed among the beneficiaries in accordance with the Distribution Act 1958.

[6] Six other children of the deceased have given their written consent to the application and agreed that the lands be sold by public auction. Two adopted children of the deceased, who were also named as beneficiaries, did not give their written consent to the application but they did not file any affidavit in opposition to the application.

[7] The respondent however opposed the application on the ground that he had been in occupation of the lands for years and that he wanted to buy the lands himself. He is still in occupation of one of the said lands. He had made known his intention to the appellants. There was however no response from the appellants.

The respondent had even made an offer, through his solicitors, to purchase the lands at a total price of RM480,000, which was above the market value of the said lands but this was rejected by the appellants, as they believed that the lands could fetch a higher price if sold by way of public auction.

[8] On 17 July 2007 the learned judge dismissed the appellants' application on the ground, among others, that there was no concrete proof that there was an offer to purchase the lands at RM713,510. That was not the end of the matter. The learned judge went a step further by ordering the appellants to sell the lands to the respondent at a total price of RM480,000 and to execute the memorandum of transfer in Form 14A within three months of the said order and that the sale proceeds be divided among the beneficiaries. Being dissatisfied, the appellants appealed to this court against the order directing them to sell the lands to the respondent rather than ordering the lands to be sold by public auction.

[9] The appellants contended that the learned judge went beyond the scope of their application by ordering the lands to be sold to the respondent rather than ordering the lands to be sold by public auction.

[10] We agree with the appellants that the learned judge, having dismissed their application for an order of sale of the lands by public auction went beyond the scope of the said application by ordering the lands to be sold to the respondent. Section 60(2) of the Probate and Administration Act 1959 empowers the High Court to make an order of sale without the concurrence of all the personal representatives. Section 60(4)(a) of the Act provides that an administrator may not sell any immovable property without the sanction of the court. The Federal Court in *Yap Yoke Luan & Others v. Ong Wee Tok & Ors* [1983] 2 CLJ 252; [1983] CLJ (Rep) 433 held that in an application for an order of sale by the administrators of the deceased estate, the duty of the court is to protect the rights of the beneficiaries and not to consider the interests of the proposed purchasers. In exercising its discretion the court will have to look into the facts and surrounding circumstances of the case ie, whether the proposed sale was favourable to the beneficiaries and whether the administrators had acted with proper prudence in exercising their overriding duty to

A obtain the best possible price. In *Ong Thye Peng v. Loo Choo Teng & Ors* [2008] 1 CLJ 571, the Federal Court held that the trustees of the estate, just like the administrators, must act in the interest of all the beneficiaries. Their duty is to ensure that the estate of which they are trustees benefits as much as possible when they B deal with trust property. In the instant appeal, the High Court ordered the lands to be sold to the respondent contrary to the relief sought by the appellants and against the wishes of the majority of the beneficiaries who supported the application that the lands be sold by public auction. There is no averment in the C respondent's affidavit in opposition, that the lands be sold to him at RM480,000. He merely urged the court to dismiss the appellants' application. In our judgment, the court clearly went beyond the scope of the appellants' application in ordering the lands to be sold to the respondent after having dismissed the D appellants' application for an order of sale by public auction. There was no evidence before the court to determine what was the best possible price at the time of making the order. In the circumstances of the case, such an order is legally unsustainable.

E **[11]** We therefore allow the appeal by the appellants with cost, set aside the order of the High Court and substitute it with an order that the lands be sold by way of a public auction.

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